DOCUMENT RESUME

ED 473 336 EA 032 370

AUTHOR	Sewall, Angela Maynard; Balkman, Kathy
TITLE	Do Special Education Teachers Leave Their Rights at the Schoolhouse Door?
PUB DATE	2002-11-00
NOTE	16p.; In: Balancing Rights: Education Law in a Brave New World. Papers [of the] Education Law Association (ELA) Annual Conference (48th, New Orleans, LA, November 14-16, 2002); see EA 032 361.
PUB TYPE	Opinion Papers (120) -- Speeches/Meeting Papers (150)
EDRS PRICE	EDRS Price MF01 Plus Postage. PC Not Available from EDRS
DESCRIPTORS	Academic Freedom; Advocacy; Civil Rights; Codes of Ethics; Elementary Secondary Education; *Freedom of Speech; Intellectual Freedom; *Legal Problems; Legal Responsibility; *School Law; *Special Education Teachers; Teacher Attitudes; Teacher Behavior; *Teacher Rights
IDENTIFIERS	*Individuals with Disabilities Education Act

ABSTRACT

This paper is part of a collection of 54 papers from the 48th annual conference of the Education Law Association held in November 2002. It discusses teachers' rights to private and public speech. Specifically, it examines the rights of special-education teachers and other special-education professionals to advocate, privately or publicly, on behalf of the disabled. In analyzing a number of court cases and recent legal developments regarding freedom of speech for special-education teachers, the paper touches briefly upon a variety of issues, including the following: (1) teacher property interests in teaching a particular grade, teaching at a particular school, or teaching a particular subject; (2) teacher probationary periods; (3) tenure; (4) recognized grounds for termination of teachers; (5) the Individuals with Disabilities Education Act; (6) a code of ethics for special-education professionals; and (7) advocacy versus unprotected speech. (WFA)

Reproductions supplied by EDRS are the best that can be made
from the original document.

ED 473 336

Do Special Education Teachers Leave Their Rights at the Schoolhouse Door?

Angela Maynard Sewall
Kathy Balkman

November 2002

U.S. DEPARTMENT OF EDUCATION
Office of Educational Research and Improvement
EDUCATIONAL RESOURCES INFORMATION CENTER (ERIC)

✔ This document has been reproduced as received from the person or organization originating it.

☐ Minor changes have been made to improve reproduction quality

• Points of view or opinions stated in this document do not necessarily represent official OERI position or policy.

PERMISSION TO REPRODUCE AND DISSEMINATE THIS MATERIAL IN MICROFICHE, AND IN ELECTRONIC MEDIA FOR ERIC COLLECTION SUBSCRIBERS ONLY, HAS BEEN GRANTED BY

R. Wagner

TO THE EDUCATIONAL RESOURCES INFORMATION CENTER (ERIC)

2A

EA 032 370

BEST COPY AVAILABLE

Angela Maynard Sewall, Ed.D.
Professor
Department of Educational Leadership
University of Arkansas of Little Rock
2801 South University Avenue
Little Rock, AR 72204
(501) 569-3267/FAX (501) 569-8694
e-mail: amsewall@ualr.edu

Kathy Balkman
Assistant Professor
Henderson State University
100 Henderson Avenue
(870) 230-5213/FAX (870) 230-5029
Arkadelphia, AR 71999-0001
email: balkmak@hsu.edu

48th Annual Education Law Association

November 14-16, 2002

Do Special Education Teachers Leave Their Rights At The Schoolhouse Door?

The old adage "never assume anything" has particular moment as we reflect about freedom of speech and the legal precedents that have led to constant honing by the Courts of what the balance might be between rights and the needs of the workplace. Each time that a major case is decided on the topic of free speech, there is a tendency to be lulled into a sense of closure. After all, we have the Connick case, the Pickering test and Mount Healthy to guide us. However, several recent cases involving special education teachers demonstrate that the school house door is still open and redefinition of what rights a teacher brings in that door are on-going as they relate to public and private speech.

Speech and Precedent

In Mount Healthy School District v. Doyle (429 U.S. 274) (1977), the Supreme Court heard the case of a non-tenured schoolteacher on the issue of freedom of speech. Several applicable points of law that touch the focal cases

EA032370

in this paper arise in Mount Healthy. The court, in Mount Healthy, established that a school employee must show that his expression is protected and that the protected expression (speech) was a motivating factor and a substantial factor in the decision of the school board to act to discipline the teacher. In fact, the court clearly noted that it was up to the teacher to show that his speech was constitutionally protected and that this conduct was the reason why he was not rehired. Protected speech may be framed by the question of whether or not the speech in question disrupts the orderly processes of the school. In fact, in the Mount Healthy case, it was also noted that if Doyle did demonstrate these facts, then the school board would have to show by a preponderance of evidence that it would have reached that same conclusions and acted in the same way absent the protected conduct (at 287)

In another familiar speech case, Pickering v. the Board of Education (391 U.S. 563) (1968), the Supreme Court had ruled that a teacher's exercise of his right to speak on issues of public concern may not be the reason for the teacher's dismissal. The court qualified this statement; however, by adding the qualifier that the proven existence of false statements recklessly made by the teacher would preclude that protected exercise. (Zirkel p. 70). The Court reiterated that the teacher's right to speak on issues of public importance could not furnish the basis for dismissal of that teacher. In fact, the Court noted that public school teachers may not constitutionally be compelled, as a condition of retaining their employment, to relinquish the First Amendment rights that they would otherwise enjoy as citizens to comment on matters of pubic interest in connection with the operation of the public schools in which they work (U.S. Digest Lawyers Edition, Headnote 2 _ 925). The Pickering case, also established a balance test, generally used by the courts in cases of free speech rights, noted in multiple cases subsequently, that of balancing the free speech rights of the teacher against the maintenance of discipline, harmony, and efficiency within the school environment. Once again the Court raised the issue of legitimate public concern (at 572). The Court also stated: there is no occasion furnished by this case (Pickering) for consideration of the extent to which teachers can be required by narrowly drawn grievance procedures to submit complaints about the operation of the schools to their superiors for action thereon prior to bringing the complaints before the public (footnote 4) Both of these positions delineated by the Court are applicable to the cases in question in this paper.

In 1982, the case Connick v. Myers, 461 U.S. 1684, was appealed to the Supreme Court from the Fifth Circuit. In this case, a state government employee was discharged for the distribution of a questionnaire concerning internal office affairs. The Court held that the discharge did not violate the First Amendment since the subject matter of the survey was not protected free speech and served to impede the efficiency of the office. The speech was judged to be in regard to private not public matters and had a negative impact on office morale. The balance of interest in regard to free speech relates to the governmental interest in effective and efficient conduct of responsibilities in the office and to the public. Hence, the employer was not required to tolerate actions that would disrupt that efficiency and undermine his authority. The bottom line is that matters of private concern are not protected in the work place as first amendment free speech.

In the case Rankin v. McPherson, 483 U.S. 378 (1987), a public employee in a constables office was fired for a private expression of hope that the President would be assassinated. In the appeal of the fifth circuit decision, the Supreme Court noted once again that the determination of whether a public employer has properly discharges an employee for engaging in speech requires a balance between the interest of the employee, as a citizen, in commenting on matters of public concern, and the interest of the public employer in promoting the efficiency of the public services it performs through its employees It was held that the employees free speech rights had been violated by the discharge since the comments came in the context of a discussion of the presidents policies and was not intended as a threat. the inappropriate or controversial character of a statement is irrelevant to the question whether it deals with a matter of public concern (Pp. 384-387).

A key distinction in regard to all of these cases as well at the three under close scrutiny in this presentation, Fales, Khuans and Settlegoode, is whether the speech is job related, part of the job or unrelated to the job. (Wells, p. 22)

Current Legal Developments

The problem of balancing freedom of speech against the governments interest is compounded in the school setting. The School is, indeed, a government agency but one with particular responsibilities and concerns. As noted by Wells (p. 1) courts are persuaded by the argument that, in these (governmental sic)) organizations, respect for hierarchy and a high capacity for teamwork is vital for effective performance Therefore other questions and contexts must be considered. Of course, the facts of the case present that special context for consideration. Still the Courts have been reluctant to state a general rule favoring either the state or the individual in this area (Wells, 2)

The issue is compounded when there is damage to one of the parties; for example, in the case of retaliation for the exercise of free speech and that damage or redemption thereof falls within the aims of section 1983 thereby blunting the issue of immunity for the state. Several cases touch on this issue as well as the issue in Settlegoode, Khuans and Fales.

In Hughes v. Whitmer, 714 F.2d 1407 (1983), a state trooper was transferred to a different district in the Missouri Highway Patrol. The trooper alleged that his first amendment rights were violated because the transfer was in retaliation for protected free speech activities in which he had engaged. The speech related activities in question was in regard to friction between two troopers and the troopers comments about a fellow officer and that officers sons alleged illegal activities. The question for the district court was whether or not the transfer was a disciplinary action and, if so, whether or not a hearing should have been required prior to carrying out the transfer. The court notes, on appeal, that the question of property interest was also involved and whether an employers historical practices and conduct which rise to the level of a common law of the employment relationship that both parties recognize (Perry v. Sinderman, 408 U.S. at 602) a property interest. The court found that there is specific power granted to the Superintendent in Missouri to transfer troopers at his discretion. Missouri statutes obviated the issue of property

interest not in a position but to a particular permanent assignment. The statutes also provide that a member of the state troopers has no interest requiring protection in a pre-disciplinary hearing unless the members removal is recommended. Neither was his liberty interest implicated as Hughes failed to show injury to his reputation by such a transfer. Although this is not a teacher/school case, the issues of liberty and property interest have bearing on the cases that are central to this presentation.

In 1983, the Eighth Circuit Court of Appeals heard McGee v. South Pemiscot School District, 712 F.2d 339. This was the case of a schoolteacher who brought action under 42 U.S.C. _ 1983 after losing his job. The claim was that the school district fired him for a letter he had written to the local newspaper editor. The question was whether his conduct was protected. The jury in the court of original jurisdiction found that the non-renewal of the contract was motivated by protected conduct under the First Amendment. The Court of Appeals, however, that although citizens do not lose all of their First Amendment rights when they become public employees, the state does have an interest in regulating free speech. A balance must be reached therefore. While a school board generally may not dismiss an employee for criticizing school policies that are of public interest, the issue of harmony in the workplace and interference with the operations of the schools were considered.

While the District Court found that the letter was not the motivating factor for dismissal of the teachers, the Appeals Court noted that the plaintiff bears the burden of showing that the conduct (writing the letter) was the motivating factor in the school boards non renewal decision. The Appeals Court also noted that the jury had found otherwise and remanded the case to the District court for judgment in line with the jury decision.

In 1983, the Eighth Circuit also heard the case Bowman v Pulaski County Special School District, 723 F.2d 640. In the Bowman case, another 42 U.S.C. _ 1983 claim was made alleging that tenured non-probationary teachers were involuntarily transferred due to their public statements to district patrons concerning the administration of corporal punishment by a colleague even though each acknowledged that he had not actually witnessed the administration of discipline. The court delineated a three-step analysis needed to determine whether or not the first amendment rights of a public employee have been violated. These are:

1. Analysis of whether the plaintiff has demonstrated that he is engaged in protected activity.

2. Whether or not the protected activity was a substantial factor in the actions taken against the plaintiff.

3. Whether the defendant has demonstrated that the same action would have been taken absent the protected activity, thereby overcoming the plaintiff's claims.

A mitigating factor in this case was noted by the Court was that there was public interest in the subject of the speech. The time, place and manner of the speech as well as its context were also considered by the court. Finally, the court

raised the question of whether the speech impeded the appellants ability to perform their duties and found that no evidence that this was the case. The court therefore concluded that the appellants speech was protected and that involuntary transfers can be as effective as discharges in chilling the exercise of first amendment rights Accordingly, the teacher prevailed.

In Sexton v. Martin, 210 F.3d 905 (2000), the Eight Circuit Court of Appeals again dealt with questions of free speech rights and the efficiency of the workplace. In this case, the question of qualified immunity on the part of the employer, the city of Des Peres, Missouri, was raised. Sexton had allegedly been terminated in retaliation for the exercise of first amendment rights. To determine qualified immunity, two steps are necessary. First, the court must ascertain whether or not an assertion of the violation of constitutional rights has been made and secondly, whether the constitutional right was clearly established at the time of the termination of the employee. Once this determination is made and the Pickering balance test is applied, a determination can be made as to whether or not constitutional rights were impaired and whether damages are warranted. In either case, sufficient evidence must be proffered to warrant the decision of the Court and the positions of the parties to the case. Qualified immunity would be an entitlement if the actions taken by the employer were objectively reasonable in light of the clearly established law and facts know by him at the time of his actions and the true basis for those actions, i.e. speech or behavior.

Other cases including Belk v. Eldon, 228 F.3d 872 (2000), McGill v. Board of Education of Pekin Elementary School District No. 108, 602 F.2d 774 (1979), Smith v. West Memphis School District, 635 F.2d 708 (1980), and Porter v. Dawson Educational Service Cooperative, 150 F. 3d 887 (1998) deal with issues of free speech, employer efficiency and retaliation in the form of transfer or discharge. In each case, the Courts reviewed issues similar to those previously discussed.

Teacher Property and Liberty Interests

The issues of property interests in employment as a teacher is often predicated on the language contained in state codes as to when a teacher is recognized as tenured or non-probationary. In several states, this is the point at which a teacher receives a standard teaching license. At that time, the contract cannot be non-renewed. Therefore, if a teacher is not to continue working at a district, termination for cause is the path that must be pursued by the

school district administration. The recognized bases for termination for cause generally are incompetence, grounds related to in-school behavior and performance of duties other than actual teaching (school citizenship) (Imber & Van Geel at 359), incapacity, unfitness or posing a threat to students.

Even a tenured teacher does not have property interest in teaching a particular grade or at a particular school or even in a subject provided he or she is licensed to teach the assigned grade and/or subject.

Liberty interests extend to the right of a teacher to maintain his or her reputation, the good name. Liberty interests also protect the due process rights of a teacher in the event of disciplinary action on the part of the district.

Ethics and Legal Responsibilities of School Personnel

Taking these cases as precedent, the issues of Settlegoode, Khuans and Fales can be more meaningfully examined only after due consideration of the legal and ethical principles on which school administrators and special education teachers are expected to operate. There can be no question that special education teachers, due to the very nature of their specific job responsibilities, may find themselves in an awkward and/or uncomfortable situation when the issue of freedom of speech arises. To understand these unique job responsibilities, established by contract with a board of education, one must briefly review three federal laws that require, either directly or indirectly, local school districts to provide special education services for students with disabilities.

The first of these, The Individuals with Disabilities Education Act (IDEA), was designed to:

" assure that all children with disabilities have available to them ... a free appropriate public education which emphasizes special education and related services designed to meet their unique needs, to assure that the rights of children with disabilities and their parents or guardians are protected, to assist states and localities to provide for the education of all children with disabilities, and to assist and assure the effectiveness of efforts to educate children with disabilities." (IDEA, 20 USC Section 1400 (c)).

To fulfill the mandate of IDEA each state, and, then by reference, each local school district must establish procedural protections, which are the policies and procedures that guarantee that all students with disabilities have this right to a free and appropriate public education (FAPE). Each state and local school district must also ensure that procedural safeguards, designed to protect the rights of children with disabilities and their parents, are in place. These procedural safeguards are to ensure that parents have opportunities for meaningfully participation in all decisions regarding their child's special education program. Examples of these procedural safeguards include:

Notice must be given to the parent before the school district initiates, changes, or refuses to initiate or change identification, evaluation, or placement decisions. This notice must be given within a reasonable time frame allowing for the parent to fully participation in the decisions.

Written parental consent must be gained prior to a preplacement evaluation and initial placement in the special education program. This consent can be withdrawn at any time by the parent.

Parents must be given the opportunity to examine all school records on their child.

The substantive right of FAPE addresses the special education program which consists of special education, defined as specially designed instruction and related services, and any developmental, corrective, or supportive services that students need to benefit from their special education program. These instructions and/or services are to be provided at no charge to the parent/guardian and must meet the unique needs of each child with a disability. All services must comply with the standards established by the state educational agency (SEA) and must include appropriate preschool, elementary and /or secondary school education. These instructions and/or services are to be documented and provided through the individualized educational program (IEP), which is written during a conference composed of a group of persons, including the parent, who have knowledge of the child.

Section 504 of the Rehabilitation Act of 1973, as well, provides a FAPE mandate for children who have disabilities. Section 104.33 (a) states:

"a recipient of federal funds that operates a public elementary, or secondary education program shall provide a free and appropriate public education to each qualified handicapped person who is in the recipients' jurisdiction regardless of the

severity or nature of the person's handicap." (Section 504 Regulations, 34 C.F.R)

These regulations clarify that an appropriate education is one that consists of regular or special education and related services designed to meet the individual educational needs of that person with the disability as adequately as the needs of those who are do not have disabilities are met. The issue at stake is one of comparability. In other words, services that are provided to students with a disability must be as comparable as those provided to those without a disability. These services are to be provided through a plan, sometimes called an Accommodation Plan, that documents such required services.

Section 504 further stipulates that this education and necessary services are to be provided in accordance with specific procedures. Specific procedural safeguards are required in all school actions and decisions that address the identification, the evaluation, or placement of a student that has a disability. These specific safeguards are:

Notice of school actions

Opportunity to examine relevant records

Impartial hearing for resolutions of disagreements

Review procedure for resolutions of disagreements (Section 504 Regulations, 34 C F.R. Section 104.33 (b)).

The American with Disabilities Act (ADA) does not have a specific FAPE mandate or standard. Office of Civil Rights (OCR) holds that ADA , though, does have a FAPE standard through Section 504. The right to FAPE, which exists through the non-discrimination requirement of Section 504, applies then to all state and local governments, entities and agencies and to private schools systems. (Yell, 1998)

Special education teachers and administrators have not only a legal and contractual base for the provision of FAPE but an ethical consideration as well. Often times, it is the special education teacher who must serve as the advocate for the delivery of appropriate services and to ensure the procedural safeguards for children with disabilities and their parents are implemented. This difficult and complex role of advocate is grounded, not only in preservice training, but as standards of ethics for professional organizations. One such organization, The Council for Exceptional Children (CEC), has an established and approved Code of Ethics which holds, among other things, that:

A. Special education professionals are committee to developing the highest educational and quality of life potential of individuals with exceptionalities.

B. Special education professionals promote and maintain a high level of competence and integrity.

C. Special education professionals engage in professional activities which benefit individuals with exceptionalities, their families, other colleagues, students, or research subject.

D. Special education professionals exercise objective professional judgment in the practice of their profession.

E. Special education professionals work within the standards and policies of their profession.

F. Special education professionals do not condone or participate in unethical or illegal acts nor violate professional standards adopted.

The National Association of Elementary and Secondary Principals (NAESP), in its statement of ethics, indicates that all administrators should subscribe to the following standards in addition to others not listed herein:

1. Make the well being of students the fundamental value in all decision making and actions.

2. Fulfills professional responsibilities with honesty and integrity.

3. Supports the principle of due process and protects the civil and human rights of all individuals.

4. Obeys local, state and national laws.

5. Implements the governing board of education's policies and administrative rules and regulations.

6. Pursues appropriate measures to correct those laws, policies and regulations that are not consistent with sound educational goals.

In light of the legal mandates to provide FAPE, or special education and related services, school districts will assign to building administrators and special education teachers the day to day responsibility of ensuring these required services per the IEP or Accommodation Plan and the necessary safeguards are provided. By being on the front line, it is often the special education teachers who recognize that these appropriate services are not being provided or that the procedural safeguards are not being implemented as required. These teachers may find themselves in that proverbial hard spot. Acknowledge the lack of services to the responsible administrator and/or parent which could then result in strained working relationships or even termination of their job. Or, do not speak out on the non-delivery of services or procedures, accepting that FAPE has been denied to the child. This denial could result in a potential due process hearing or court action.

Parental Recovery of Damages Under IDEA

Of particular interest are the cases Doe v. Withers, Civil Action NO. 92-C-92 (Circuit Court of Taylor County, West Virginia), W.B. v. Matula, 67 F.3d 484 (1995) and Whitehead v. Hillsborough, 918 Fed. Supp. 1515 (1996). In each of these cases, parents alleging a failure on the part of the school district to provide adequate and appropriate services to a child with a handicapping condition recovered either damages, or in the Whitehead case, actual costs borne by the parents in regard to the child's education. The interesting point is that although IDEA was not intended to be a vehicle for the recovery of damages by parents, there is precedent for awards of damages and costs to families even in the absence of constitutional issues.

Settlegoode, Khuans and Fales

In the case of Settlegoode v. Portland Public Schools, CV-00-313-ST (2002), Dr. Pamela Settlegoode was an adaptive physical education teacher who taught p.e. to students with disabilities in the Portland School district from 1998-2000. Dr. Settlegoode's contract was not renewed by the district for the 2000-2001 academic year. Dr. Settlegoode was a probationary teacher during the two years for which she worked in the Portland District. Dr. Settlegoode worked with several students who received services under Section 504. It was her allegation that the district intentionally did not provide appropriate equipment, facilities and scheduling for meeting the needs of these students. At one school site, the special education supervisor advised Dr. Settlegoode not to provide any services to disabled students. Dr. Settlegoode reported these allegations and alleged that her students were subject to

discrimination and that they were being denied FAPE. These reports were made to the special education supervisor and the superintendent.

Dr. Settlegoode filed suit pursuant to her non renewal alleging that she was coerced into not following the intent of the Act 504 and that she was non renewed when she refused to comply with this directive and continued to report the actions of the district in good faith. She further alleged that the district non renewal of her contract was retaliatory in nature and violated her first amendment rights.

No reason was given by the district for the non-renewal , however, the district position in trial was that Dr. Settlegoode did not prove that the district would not have non-renewed her contract absent the activity in which she engaged regarding the rights of students with disabilities under Section 504. The court noted that the defendant did have a burden of articulating some legitimate non-discriminatory reason for non-renewal or in the case in which the plaintiff creates the presumption that the adverse employment decision was the product of retaliatory intent defendant may rebut this presumption by showing by a preponderance of the evidence that the adverse action would have been taken even in the absence of discriminatory or retaliatory intent (Ruggles v. California Polytechnic state university, 797 F2d 782 (1986). The Portland District attempted to demonstrate the IEP is prepared by Dr. Settlegoode were not adequate and not up to appropriate standards and that Dr. Settlegoode did not demonstrate adequate ability to teach a group of students. The court found that the district would have non-renewed Dr. Settlegoode even absent the issues of her protected activities. The jury came to a different conclusion.

The court applied the Pickering test of public concern and workplace efficiency balanced against individual liberty interests. The jury, however, found that the real issue was about accommodating the situation for teaching students with handicapping conditions. The court then examined the question of whether there was actual interest to the districts legitimate interests, if the evidence is viewed solely in favor of the defendant. Disharmony did occur in light of Dr. Settlegoode's complaints. The defendant did not complain outside of the line of authority within the district, however, and was not therefore covered under the Whistleblower Act in Oregon. Although the jury had decided that punitive and compensatory damages should be awarded to Dr. Settlegoode in the U.S. District Court, there was an apparent misunderstanding of the jury instructions is a is the jury role in determining damages. The court, on the appeal, granted the defendant school districts motions and the action was dismissed.

Although, in the final analysis, Dr. Settlegoode's claim was not found to be true as a matter or law and no settlement was actually granted, the issues of the public duty of a special education teacher, that teacher's speech rights and the needs of the district were raised in a context different from that found in most speech cases related to teacher's first amendment rights. The fundamental difference may be found in the greater duty owed by teacher and district to a student covered by IDEA or Section 504.

The other case on point is that of Fales v. Garst, 235 F.3d 1122 (2001). In Fales three teachers and their building administrator had a long history of conflicts and tension over the needs of the special education students. Principal Garst instructed the teachers they were not to discuss any incidents surrounding special education students with anyone. He questioned the instructional areas documented on an IEP and the implementation of that IEP without his approval. He later demanded that teachers could not implement any IEP's without his direct authorization. The teachers were denied by Garst the opportunity to share with appropriate faculty the special needs of a medically fragile student and a student who was considered a danger to himself and others. Garst refused, as well, for a special education student to call his father to pick him up after school was dismissed early for a weather emergency. If one of the appellees had not called the father, the student would have arrived to a locked home with no place for supervision or safety during a severe snow storm. During a medical emergency concerning a student with a severe heart condition, Garst locked 4 of the 6 emergency personnel out of the room where the student was located. By chance, one of those locked out was a volunteer special education advocate. Garst eliminated the planning period for the special education teacher, while increasing the planning time for the 5th and 6th teachers. The local newspaper published several articles on Garst's mistreatment of special education students and interference with services. Other faculty members confronted the three teachers with the conflicts, resulting in pro- and anti- Garst factions.

Garst did admit to the teachers and others that he lowered performance evaluations as a direct result of the conflicts between them. He agreed, as well, to the IDEA violations. The district court denied Garst's motion for summary judgment on the grounds of qualified immunity and found for the appellees.

The 8th Circuit Court found that the complaints did fall within the matter of public concern. Even though the facts of the case were undisputed, the court found that the effect of the public speech created school factions and disharmony among the faculty. The working relationships in the school deteriorated significantly. The court determined, as well, that Garst's ability to administer the school's program was seriously impacted. The court, applying the Pickering balance test, found that the speech was not protected and reversed the district court. Summary judgment for qualified immunity was granted.

Khuans v. School District 110 (123 F.3d 1010) (1997) focuses, as well, to this conflicting issue of freedom of speech vs. advocacy for special education services. Khuans was a school psychologist on contract with a special education cooperative that provided special education services for School District 110. She complained, in her capacity as a school psychologist, to the building administration that the school district was violating several of the procedural safeguards mandated in the IDEA. As a result, the district was not providing FAPE and was not in compliance with the IDEA. Violations of the procedural safeguards included non-delivery of services and programs established on the IEP, not giving notice to parents for conferences where special education decisions for their child were to be discussed and made, prematurely determining disabilities prior to the multidisciplinary team diagnostic data and input, and by changing the placement and services of specific students without following the required processes and procedures. Khuans also complained to the building administrator that it was difficult to communicate with her

immediate supervisor, and that this supervisor was often not on campus. After ultimately meeting with the school superintendent, the assistant administrator and her immediate supervisor, Khuans was told that her contract with the special education cooperative would not be renewed. Khuans claimed that her termination was in retaliation for her complaints on the violations of IDEA.

One of the issues that surfaced in this case is qualified immunity. The district court, in response to the school 's claim for qualified immunity noted that the issue "would be best addressed at a later time when more facts have become apparent:" and denied the motion. On appeal the ruling was reversed and the court did find for the motion to dismiss the superintendent on qualified immunity. The court clarified that qualified immunity is not a release of liability, but immunity from lawsuits. It is an issue for appeal, based solely on a matter of law, if a case by error is allowed to go to trial.

The issue of independent contractor comes through the court's decision on qualified immunity. The status of Khans' position as an independent contractor was unclear and muddied the issue of qualified immunity. When Khuans was terminated, the 7th Circuit had not yet addressed or clarified whether independent contractors could be terminated for speaking out on wrongdoing. The appellate court held that protected speech was not governed by pre-existing law. Thus, the superintendent could not have reasonable known he was violating the First Amendment when he became a party to the termination.

The other issue at stake focuses to the claim of retaliation for speaking out on the violations of IDEA. The appellate court agreed with the district court that the Khans' public complaints of the district's violations of IDEA were protected. The court also agreed that it was in the best interest of the public to make public the potential or actual wrongdoing. Unfortunately, Khuans' complaints also addressed a conflict with her supervisors, which is seen as private employment concerns. In fact, the court found that the few complaints concerned with IDEA violations were just a small part of the whole matter. The district court, affirmed by the appellate court, found that her comments and complaints did not fall under protected speech due to their form, context and effect. The court found that her complaints actually resulted in a disruption of the daily workings of the special education program.

Advocacy vs Unprotected Speech

Special education teachers can advocate for their students with protected speech. Khuans shows that when special education teachers focus their complaints solely to the violations of IDEA, 504 and or ADA, protected speech under the First Amendment is possible. These teachers must walk the fine line of advocating when in making wrongdoing public. They must substantiate that the complaints are of public concern and that the public criticism outweighs any disruption to the administration of the public school system and/or it's programs. Wales v. Board of Education of Community Unit School District 300, 120 F.3d 82 (1997) tells us that one indicator of the true nature of the public criticism is to whom the statements are made. When statements are made only to a supervisor or an administrator it

may be interpreted that "speaking out" is for personal gain or interests in a disagreement. If the true intent of speaking out is not for a "public call for change", but one of employment issues and concerns, the possibility exists that the speech is not protected.

Special education teachers should recognize that their efforts to advocate can be protected not only under the First Amendment but under the same three federal laws that establish and protect special education services for students with disabilities. Section 503 (a), Title V, of the ADA prohibits retaliation "when an individual made a charge, testified, assisted, or participated in any manner in an investigation, proceeding or hearing...". Section 503 also "prohibits interference, coercion, or intimidation... on account of his or her having aided or encouraged any other individual in the exercise or enjoyment of any right granted by this Act." Section 504 and the ADA require that public schools must have written grievance procedures. These grievance procedures must provide, to teachers and others, "prompt and equitable resolution of complaints alleging any action prohibited by Section 504". Section 504 also allows for teachers and others to question the appropriateness or delivery of services under a 504 Accommodation Plan. IDEA establishes the procedure of committee review of any aspect of FAPE. (Martin, 2002)

One concern that special education teachers must address when advocating for their students is confidentiality. Both IDEA and 504 require assurances that personally identifiable information are collected, maintained, and used with strict confidentiality and available to only those who are working directly with the students. Access to records of students receiving special education services is protected as well. Access is limited to those who work directly with the student or on "an as need basis". With written parent permission, confidential information can be shared with others. The Family Education Rights and Privacy Act (FERPA) also requires special treatment to ensure the privacy of students confidential information in how it is collected, maintained, and used. (FERPA, 1974) In all three laws, it is understood that all employees of the school district will comply with the confidentiality mandate. It becomes important that special education teachers advocate and share information on lack of services or violations of procedural safeguards under the mandate of confidentiality.

Porter v. Dawson Educational Service Cooperative, 150 F3d 887 (1998) is an 8th Circuit case that addresses the issue of confidentiality. Porter, an early childhood special education coordinator, alleged that she was terminated from her position for speaking out against the release of identifiable information that would verify the submitted Cooperative's early childhood special education "child count" to the Arkansas Department of Education (ADE). Central to this case is an earlier court decision in A. B. ex. rel. B B. v. Arkansas Department of Education, No. LR-c-817 (1992), in which Porter was disposed. In A. B. the district court held that releasing confidential and identifiable information to the ADE did not violate the confidentiality mandate and complied with IDEA regulations and ADE policy. This ruling cleared the way for the Cooperative to submit to the ADE a list of children, by name, date of birth and disability which would be used as information for the Cooperative's child count. Porter, after the A. B. decision, publicized through a statewide newspaper a conflicting position concerning the release of this confidential information to the ADE and potential harm to the children. What becomes critical is that the newspaper

article identified her by name, position, and employer. The director of the Cooperative first recommended a non-renewal of Porter's contract for various reasons, such as refusal to cooperate with the ADE and to release the identifiable information. He later "withdrew" the recommendation of non-renewal and recommended termination for mismanagement of the early childhood special education program.

At the district level, the jury returned the verdict in favor of Porter and awarded compensatory damages of $150,000.00 with another $300,000 for punitive damages against two of the defendants. The district court later found, as a matter of law, for the appellees stating that Porter's speech did involve a matter of public concern but that the Pickering test favored the Cooperative. The court, citing a finding from the jury, stated that Porter's speech caused or would have caused disharmony in the workplace, damaged working relationships and marred her ability to fulfill her job duties.

On appeal, the court held that Porter did not have protected speech. The first issue at stake, confidentiality of identifiable information as a matter of public concern, was not disputed. The standard from Pickering became the important issue. The court found that Porter's statements in the newspaper could undermine the authority and disrupt the operations and functions of the Cooperative. The court also found that the motive for the newspaper article was a personal with an element of self-interest. Evidence from the district trial suggested that Porter's position on the release of confidential information and her participation in the A. B. case stemmed from concern that the early childhood special education program was out of compliance and that children were being served incorrectly and inappropriately. In light of these findings, the court found for that Porter's speech was not protected.

The dilemma of advocacy as protected speech will only continue for special education teachers and others. In fact, a recent suit, Cohen v. South Coast Education Service District in Oregon looks again at the issue of retaliation and freedom of speech, but this case concerns a special education paraprofessional who repeatedly reported to her supervisors the lack of equitable services and appropriate equipment for students with disabilities. Ms. Cohen alleges intimidation, adverse transfers, increased surveillance and threats of termination as a result of her efforts to secure appropriate services for her students with disabilities. ("School district", 2001).

The question to be examined really is whether or not advocacy for students with disabilities is the role of the teacher or the paraprofessional. If so, a concomitant question is whether or not that advocacy is protected speech when the school employee "goes public" in the fact of a school district that seemingly is reluctant to follow the spirit and, in some cases, the letter of the law.

U.S. Department of Education
Office of Educational Research and Improvement (OERI)
National Library of Education (NLE)
Educational Resources Information Center (ERIC)

NOTICE

Reproduction Basis

[X] This document is covered by a signed "Reproduction Release (Blanket)" form (on file within the ERIC system), encompassing all or classes of documents from its source organization and, therefore, does not require a "Specific Document" Release form.

[ ] This document is Federally-funded, or carries its own permission to reproduce, or is otherwise in the public domain and, therefore, may be reproduced by ERIC without a signed Reproduction Release form (either "Specific Document" or "Blanket").